

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
SHUMATE CONSTRUCTORS INC.
TO ASSESSMENT ISSUED UNDER LETTER
ID NO. L2050148480**

No. 11-12

DECISION AND ORDER

A hearing was held on the above captioned matter on May 17, 2011 before Brian VanDenzen Esq., Hearing Officer, in Santa Fe. Mr. Mark Shumate, President of Shumate Constructors, Inc. (“Taxpayer”) appeared *pro se*. The Taxation and Revenue Department of the State of New Mexico (“Department”) was represented by Peter Breen, Special Attorney General, Taxation and Revenue Department. Protest Auditor Andrea Umpleby appeared as a witness for the Department. In addition to the documents contained in the Administrative File articulated during the beginning of the hearing, Taxpayer #1 (October 24, 2007 Letter of Mr. Shumate) is admitted into the record. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Taxpayer is a “Special Payment” taxpayer under the NMSA 1978, Section 7-1-13.1 (2005).
2. As a “Special Payment” taxpayer, Taxpayer was required to pay taxes at least one business day before the due date directly to the Department in Santa Fe if paying by check drawn against a New Mexico bank. *See* NMSA 1978, Section 7-1-13.1 (B) (2005).

3. For the CRS reporting period ending August 31, 2007, taxes were due for a “Special Payment” taxpayer if paid by check drawn against a New Mexico bank on or before September 24, 2007.

4. During this relevant period of time, Taxpayer had not arranged for electronic payment and was paying taxes with a check drawn against a New Mexico bank.

5. For the periods predating the August 31, 2007 CRS reporting period, Taxpayer relied on a courier service, NebArk, to deliver tax payments by check drawn against a New Mexico bank directly to the Department in Santa Fe.

6. On the morning of September 24, 2007, Mr. Shumate, as president of Taxpayer, personally went to NebArk to arrange for delivery of a check to the Department in Santa Fe that same date.

7. However, upon arriving at NebArk, Mr. Shumate discovered a sign announcing that NebArk was out of business. Consequently, NebArk was not available to deliver Taxpayer’s check for payment of taxes directly to the Department in Santa Fe on that date.

8. Because he had other business that day that precluded him from delivering the check personally, Mr. Shumate contacted his bank, New Mexico Bank and Trust, and asked for a recommendation for a courier.

9. New Mexico Bank and Trust advised Mr. Shumate that they relied on Hot Shot Services as a courier that made deliveries to Santa Fe.

10. In the morning of September 24, 2007, Mr. Shumate went to Hot Shot Services to hire them as a courier to deliver the check paying the Taxpayer’s required CRS-1 taxes to the Department in Santa Fe that same date.

11. Hot Shot Services assured Mr. Shumate that Taxpayer's check would be delivered to the Department that day, September 24, 2007, in Santa Fe.

12. Mr. Shumate did not follow up on whether Hot Shot Services actually delivered Taxpayer's check to the Department on September 24, 2007.

13. Hot Shot Service did not actually deliver Taxpayer's check to the Department in Santa Fe until September 25, 2007.

14. On October 16, 2007, the Department assessed the Taxpayer for \$2,785.25 in penalty on untimely payment of gross receipts, \$53.11 in interest for untimely gross receipts payments, \$38.46 in penalty for untimely paid withholding tax, and \$0.73 in interest for untimely paid withholding tax.

15. Upon receipt of the notice of assessment, Mr. Shumate contacted Hot Shot Services to determine when the Taxpayer's check was actually delivered. Hot Shot Services confirmed that the Taxpayer's check was not delivered to the Department in Santa Fe until September 25, 2007. Hot Shot Services reimbursed Taxpayer in the amount of \$16.50 for their failure to deliver the Taxpayer's check as promised.

16. Taxpayer paid the assessment on October 22, 2007, stopping the accrual of any further interest or penalty.

17. On October 24, 2007, Taxpayer requested a refund for penalty paid on this notice of assessment. [Taxpayer #1]

18. On January 16, 2008, the Department denied the Taxpayer's claim for refund in writing.

19. On January 18, 2008, Taxpayer protested the denial of claim of refund for penalty.

20. On April 10, 2011, the Department requested a protest hearing.

21. On April 26, 2011, the Hearing Bureau of the Taxation and Revenue Department sent notice of hearing, setting this matter for hearing on May 17, 2011.

DISCUSSION

Taxpayer does not contest that payment of taxes in this instance was a day late, or that the Department is mandated to impose interest for that one-day delay in receipt of payment. The only issue in this case is whether Taxpayer was entitled to a refund for payment of penalty in the amount of \$2,823.71 because the new delivery service Taxpayer relied upon failed to deliver the check paying the requisite taxes to the Department in Santa Fe on the day the taxes were due.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment and establish that he or she was not required to pay the assessment. *See Archuleta v. O'Cheskey*, 84 N.M. 428, 431, 504 P.2d 638, 641 (NM Ct. App. 1972). This presumption extends to cases involving the denial of a claim for refund. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 133 N.M. 217, 219-220 (N.M. Ct. App. 2002).

Assessment of Penalty.

When a taxpayer fails to pay taxes due to the State as a result of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, NMSA 1978 Section 7-1-69 (2003, prior to amendments through 2007) requires that

there *shall* be added to the amount assessed a penalty in an amount equal to the greater of: (1) two percent per month or any fraction of a month from the date the tax was due multiplied by the amount of tax due but not paid, not to exceed ten percent of the tax due but not paid. (*italics added for emphasis*)

The statute's use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's failure to act timely meets the legal definition of "negligence" even if a taxpayer's actions or inactions were unintentional.

Regulation §3.1.11.10 NMAC (1/15/01) defines negligence in three separate ways: (A) "failure to exercise that degree of ordinary business care and prudence which reasonable taxpayers would exercise under like circumstances;" (B) "inaction by taxpayer where action is required; or (C) "inadvertence, indifference, thoughtlessness, carelessness, erroneous belief or inattention."

While Taxpayer certainly suffered from unfortunate circumstances in this instance when the courier service he had previously employed went out of business, the Taxpayer had other reasonable options available to him at the time to ensure the timely payment of Taxpayer's gross receipts taxes on the due date. The Taxpayer acknowledged that he was not using electronic payment during the relevant period of time. Although perhaps an inconvenience given the Taxpayer's other business that day, Taxpayer could have personally delivered the check to Santa Fe. Taxpayer chose to rely on a new courier service to deliver his tax payment to the Department in Santa Fe. That service failed to deliver Taxpayer's tax payment in a timely fashion.

As the Taxpayer payment history shows, and the unfortunate circumstances involving the close of business of his previously reliable courier supports, Taxpayer certainly did not intentionally fail to timely pay his taxes in this instance. However, civil penalty is imposed for negligence as opposed to an intentional act or omission. The Taxpayer's failure to deliver the

check to Santa Fe on the day it was due, even though that failure is attributable to the agent Taxpayer relied upon, Hot Shots Services, falls within the definition of negligence because it qualifies as “inadvertence.” *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 799, 779 P.2d 982, 986 (Ct. App. 1989).

Taxpayer presented no evidence under Regulation §3.1.11.11 NMAC (1/15/01) to demonstrate nonnegligence. As such, the Department is legally required by statute to impose penalty.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely, written protest to the assessment of penalty under Assessment Nos. # L2050148480, and jurisdiction lies over the parties and the subject matter of this protest.

2. The Taxpayer is liable for civil penalty because inadvertence qualifies as negligence under the civil penalty provision.

For the foregoing reasons, the Taxpayer's protest **IS DENIED**.

DATED: June 3, 2011.